



United States Government

NATIONAL LABOR RELATIONS BOARD

Office of the Chairman

1015 Half Street, SE

Washington, DC 20570

October 4, 2019

The Honorable Robert C. "Bobby" Scott
Chairman
Committee on Education and Labor
2176 Rayburn House Office Building
Washington, DC 20515

The Honorable Frederica S. Wilson
Chairwoman
Subcommittee on Health,
Employment, Labor & Pensions
2445 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Scott and Chairwoman Wilson:

This letter is in response to your September 10, 2019 letter, revisiting questions about the process used by the National Labor Relations Board to realize efficiencies in reviewing the nearly 29,000 comments submitted to the Board in response to its proposed joint-employer rulemaking. Reviewing each comment is an arduous process, but one that we not only must undertake but are pleased to undertake to ensure that we consider all perspectives on this important area of the law.

As stated in our March 22, 2019 letter, sent in response to your initial March 14, 2019 inquiry, the Board did not outsource the substantive review of the comments submitted in response to its joint-employer NPRM. The Board engaged temporary support on a limited, short-term basis to perform the initial sorting of the public comments. This preliminary work was provided through a GSA-approved temporary staffing agency, contracted through the GSA bid process and taking all conflict-of-interest issues into consideration. The individuals working for the selected contractor executed the appropriate non-disclosure agreements standard for this type of work. Their work was overseen by NLRB staff and did not involve any substantive, deliberative review of the comments; rather, the work was limited to sorting comments into categories in preparation for substantive review by Agency labor-law professionals. As described more fully below, the categories were formulated by Agency professionals, not by employees of the staffing agency. I can assure you that only Agency personnel have supported the Board in the exercise of its deliberative functions in connection with the joint-employer rulemaking process.

The Board decided to use contractors in this limited role to save taxpayer dollars while remaining focused on its mission to decide cases expeditiously. Contracting out this initial sorting allowed the Board to conduct this work for a fraction of what it would have cost for full-time equivalent federal employees to perform the work. Importantly, contracting out the initial sorting work avoided the reassignment of Agency attorneys from case processing to largely paralegal work. Finding cost-effective ways of accomplishing our work is important to our Agency. Moreover, other federal agencies have routinely used this approach for reviewing

public comments in rulemaking. We strongly believe that using our labor-law experts for this initial sorting work would not have been the best of use their expertise.

The Board's withholding of the list of categories provided to and used by the contractor to sort the comments is based on the fact that the categories are attorney work product and constitute an integral part of the Board's deliberative process in connection with the joint-employer rulemaking. Just as the Board would withhold from disclosure drafts of decisions, the Board is withholding the categories of comments. The categories were developed by labor law experts from each of the Board Members' offices, all of whom are Agency staff. Communications between Board Members and their staff about the development of such categories likewise constitutes deliberative process and attorney work product. No separate "instructions" were provided to the contractors – the categories were the only written instructions the contractors received.

Here, I want to clear up a misunderstanding. In your letter, you quote from a June 14 Agency email, which said that "the categories . . . are the roadmap of the Agency's deliberative process on the issue of joint employer rulemaking. The documentation of the categories is no different than a preliminary outline of a Board decision draft." You state that this language is an "admission that [the NLRB] has already created 'a preliminary outline of a Board decision draft.'" It was not. Our point was to *compare* the list of categories to a draft of a decision as part of our explanation of why we were withholding the list of categories—i.e., like a draft decision, the list of categories constitutes part of the Board's deliberative process in the joint-employer rulemaking project. If that point was unclear, I regret any misunderstanding and trust that it has now been resolved.

Your letter also revisits the topic of whether inherently governmental functions have been contracted out. They have not. As part of the standard bid process for contracting of this work, the Agency's Acquisitions Office considered the requirements of Federal Acquisition Regulation 7.503 and determined that "none of the functions to be performed under NLRB's requirement for a legal support services [sic] are considered to be inherently governmental as described in FAR 7.503." (*See attached, Determination & Findings, Services Are Not Inherently Governmental*, March 8, 2019.) Further, the only work performed by the contractor was the work their paralegals performed to sort the comments. The contractor's employees did not create any summaries of the comments. Your letter excerpts language from the awarded contract in a way that implies that both sorting and summarizing work was done by the contractor. The full language of the relevant section of the contract reads: "Legal staff may be asked to summarize the content of comments received in a particular pre-determined category." That language was included solely to provide the Agency maximum flexibility under the contract. But that flexibility was not exercised, and no contractor wrote any comment summary. To answer your question about level of effort by the contractor, two contractor employees conducted the sorting work, totaling approximately 340 hours over the course of 6 weeks. The total cost for this work was just under \$15,000.

From the time the contractor's sorting work was completed, Agency staff have been responsible for all steps relating to the review and summary of comments, and Agency staff will advise the Board in its drafting of a final joint-employer rule.¹ The contractor staff in no way participated in the "determination of agency policy," they did not "determin[e] the content and application of regulations," nor did they participate in any analyses. (Federal Acquisition Regulation 7.503.) Accordingly, their work sorting comments into categories in no way violated the FAR.

Your letter also expresses concern about a potential conflict of interest. No such conflict exists. Federal agencies commonly use staffing agencies to supplement their workforce in addressing a wide variety of issues and needs, from technology to administrative support to specialized areas of expertise. This particular contractor, Ardelle, regularly performs document review work for federal agencies, as demonstrated in the credentials they provided in support of their bid submitted for this work.²

Finally, it is difficult to respond to your concern that a contractor's membership in a trade or industry association might create a conflict based on an association's participation in a matter before the Agency. There undoubtedly are countless companies that contract with the federal government that also are members of trade or industry associations advocating before the same agencies. Our understanding is that it is in the normal course for staffing agencies to be members of associations such as the Society for Human Resource Management (SHRM) and the American Staffing Association (ASA), and we are unaware of any authority for the proposition that contracting with such an agency to perform non-substantive work such as preliminary comment sorting gives rise to a conflict of interest whenever a massive, multi-member association of which that agency is a member files a comment. Moreover, there is no typical conflict-creating nexus (e.g., ownership interest) between Ardelle and these trade associations, and no connection between Ardelle's membership in such associations and the work performed by their two temporary staff paralegals.³ We certainly are not aware of anything that prohibits this common arrangement, we have seen no evidence suggesting that the relationship was improperly used in this situation, and, perhaps most importantly, we have uncovered no federal acquisition requirement prohibiting – or even cautioning against – such relationships in government contracting.

¹ Agency staff attorneys do not track their time based on the particular matter on which they are working, so the Board does not have a way to quantify the number of hours staff attorneys have worked on the joint-employer rulemaking process.

² See Contract with Ardelle, provided via email on July 8, 2019, at 3-4 and 16-18 (describing paralegal work performed by Ardelle staff including for Department of Justice, Department of Interior, Federal Housing Finance Agency, Department of Agriculture, and, in particular, review of public comments submitted to Federal Trade Commission in response to an agency proposal).

³ We note that ASA submitted a letter to the Committee dated September 23, 2019, indicating that Ardelle is not a member of ASA nor was it during the course of the work performed by Ardelle. Further, ASA's letter confirms our understanding that "the mere fact that ... companies belong to ASA, or any business organization, creates no inference that the firm endorses, or is even aware of, the positions the organization has taken in its public comments."

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In closing, I'd like to reiterate that the Board is giving and will continue to give full consideration to all comments received in connection with the joint-employer NPRM. We are pleased with the level of public participation in this rulemaking, which confirms the interest in our effort to bring greater clarity to this important area of the law.

I trust this responds to your concerns. If you have any additional questions or concerns about this or any other matter, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, reading "John F. Ring". The signature is written in a cursive style with a large, looping "J" and "R".

John F. Ring
Chairman

Attachment

DETERMINATION & FINDINGS

Services are Not Inherently Governmental ServiceNow Subscription

Findings

1. **Contracting Office:** Office of the Chief Financial Officer/Acquisition Management Branch
2. **Requiring Office:** Office of the Chairman
3. **Type of Solicitation Issued:** This will be a Task Order against a GSA FSS Contract.
4. **Requirement:** The Chairman's Office has a requirement for legal staff to assist with the review of comments received in response to Agency rulemaking. The review will include categorization of the nature of each comment, posting of the comments, and summarizing of the comments received.
5. **Not Inherently Governmental Functions:** In order to support the above requirements, the contractor will be required to perform "Other Functions" that are not inherently governmental because of the nature of the function is not specified as an inherently governmental function in FAR 7.503(c).
 - i. Appropriate government personnel will oversee contractor performance of the Order. A program manager from the Chairman's Office will provide surveillance of the services rendered. However, the contractor will be supervised by a Project Manager.
 - ii. Government personnel will perform all inherently governmental functions associated with the functions to be performed under the Task Order.

Determination

Upon the basis of this findings and determination which I make pursuant to Federal Acquisition Regulation (FAR) 7.503 and the authority of 10 U.S.C. 2383, none of the functions to be performed under NLRB's requirement for a legal support services are considered to be inherently governmental as described in FAR 7.503.

_____/s/_____
Delfina St. Clair
Contracting Officer

Date: 3/8/2019